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**FILED**  
01/31/2023  
Sara Calkins  
CLERK  
Montana Water Court  
STATE OF MONTANA  
By: D'Ann CIGLER  
41H-1043-R-2022  
Nordlund, Julia  
8.00

IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
GALLATIN RIVER BASIN (41H)  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANT: ~~Ken Leclair~~

**CASE 41H-1043-R-2022**

41H 141049-00  
41H 141055-00  
41H 141056-00  
41H 148637-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Pursuant to Water Right Adjudication Rule 23, written objections to a Master's Report must be filed within **10 days** of the date the Report was filed. If this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

If you file an objection, you must mail a copy of the objection to all parties on the Service List found at the end of this Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

## **MASTER'S REPORT**

Water right claims 41H 141049-00, 141055-00, 141056-00, 148637-00 appeared in the Preliminary Decree for the Gallatin River (Basin 41H) with issue remarks resulting from pre-decree examination by the Department of Natural Resources and Conservation (DNRC). To address the issue remarks, the Water Court consolidated the claim into case 41H-1043-R-2022.

## **FINDINGS OF FACT**

1. Claims 41H 141055-00, 41H 141056-00, and 41H 148637-00 appeared in the Basin 41H Preliminary Decree with the following issue remark:  
EXISTENCE OF THE CLAIMED RESERVOIR CANNOT BE CONFIRMED WITH AVAILABLE DATA.
2. On September 12, 2022, Ken Leclair, the currently listed claimant, filed a Notice of Ownership Issue, stating that he no longer owns the claims. Accordingly, the Water Court put the above-captioned parties on notice of their potential ownership interest in the claims and ordered them to file evidence resolving the reservoir issue remarks.
3. On November 9, 2022, Michael L. Torok and Janie Torok contacted the Court via email, stating that they believe they have ownership interest in the claims with the other above-captioned parties, and that the water is used directly from source for livestock on their property. On November 15, 2022, in a phone call, the Court directed Mr. Torok to file the requisite ownership update forms with DNRC. There is no ownership update on the DNRC database as of the date of this Report.
4. Mr. Torok verbally confirmed that there is no reservoir used for the claims, which are multiple uses of the same water right, and therefore the reservoir record should be removed from the claim abstracts.
5. Potential co-claimants William H. Haff and Robert A. Johnson were given a deadline to file evidence or contact the Water Court to show cause as to why the reservoir records should not be removed. The Show Cause Order stated if nothing is filed by the deadline, the Water Court will conclude that the parties agree with Mr. Torok's

statement that no reservoir exists, remove the reservoir records from the claim abstracts, and resolve the associated issue remarks. Nothing was filed.

6. Claims 41H 141055-00 and 41H 141056-00 have a second issue remark. The second issue remark, typically referred to as a “Bean Lake” issue remark, states the Court will hold a hearing to determine the validity of the claim subject to Section 85-2-248, MCA, and In the Matter of the Adjudication of the Existing Rights (Bean Lake III), 2002 MT 216, ¶ 10, 311 Mont. 327, 55 P.3d 396.
7. These claims also received issue remarks that serve as notification of DNRC modifications to certain elements. These issue remarks received no objections, served their purpose, and will be removed from the claims.

#### CONCLUSIONS OF LAW

1. The Water Court has exclusive jurisdiction to determine the extent of all water rights in Montana as they existed prior to July 1, 1973. *In re Deadman’s Basin Water Users Ass’n*, 2002 MT 15, ¶ 15; Section 3-7-501, MCA.
2. The Water Court is required to resolve all issue remarks not resolved through the objection process. Section 85-2-248(2), MCA. When resolving issue remarks, the Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.
3. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie status may be overcome by a preponderance of the evidence showing that an element of the claim is incorrect. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33.
4. If a claimant fails to comply with an order issued by the Water Court, the Court may, upon motion or its own initiative, issue such orders of sanction with regard thereto as are just. Rule 22, W.R.Adj.R.
5. Pursuant to Section 85-2-248(9), MCA, and Rule 22, W.R.Adj.R., when a claimant fails to comply with an Order issued by the Water Court, including an Order issued by a Water Master appointed by the Court, the Court, upon motion, or its own initiative,

- can: 1) amend the elements of the claim to conform with the information in the claim file or information obtained by the Court, or 2) terminate the claim.
6. Potential owners failed to comply with the Water Court's Order to file evidence and participate in the adjudication process to resolve the issue remarks on these claims. This failure to comply, the confirmation from Mr. Torok, and the Court's inability to locate the reservoir justify the removal of the reservoir from the claims.
  7. Under the prior appropriation doctrine, a physical diversion traditionally served two purposes, 1) providing notice of a user's intent to appropriate water, and 2) defining the extent of the use. *Bean Lake III*, ¶ 22. However, the Montana Supreme Court rejected the requirement of a physical diversion for proof of intent for fish, wildlife and recreation claims in *Bean Lake III*. *Bean Lake III*, ¶ 20. Intent remains an essential element and "may be proven through means other than a diversion", such as through other facts and surrounding circumstances. *Bean Lake III*, ¶ 23; *Wheat v. Cameron*, 64 Mont. 494, 210 P. 761 (1922).
  8. "Beneficial use" means "a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stockwater, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses." Section 85-2-102(4)(a), MCA. Under Montana water law, the application of water to a beneficial use has always been the true test of an appropriation. *Bean Lake III*, ¶ 10 (citing *Thomas v. Guiraud*, 6 Colo. 530, 533 (1883) ("the true test of appropriation of water is the successful application thereof to the beneficial use designed, and the method of diverting or carrying the same, or making such application, is immaterial.")).
  9. The Montana Supreme Court held that fish, wildlife and recreation claims were recognized beneficial uses prior to July 1, 1973, "where the intended beneficial use did not require diversion, and when the facts and circumstances indicate that notice of the appropriator's intent had been given." *Bean Lake III*, ¶ 40.
  10. The information provided to the Court resolves all issue remarks.

## RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends the Court make the changes specified above to correct the Preliminary Decree for this Basin.

Post Decree Abstracts of Water Right Claim are served with this Report to confirm the recommended corrections have been made in the state's centralized record system.

### **ELECTRONICALLY SIGNED AND DATED BELOW.**

#### **Service via USPS Mail:**

*Potential Owners:*

Robert A. Johnson  
2 Snowberry Ln  
Bozeman, MT 59718

Michael L. Torok  
215 Martinez Spring Rd  
Bozeman, MT 59718

William H. Haff  
821 Martinez Spring Rd  
Bozeman, MT 59718

#### **Service Via Electronic Mail:**

Benjamin S. Sudduth  
Sudduth Law, PLLC  
1050 East Main Street, Suite 3B  
PO Box 507  
Bozeman, MT 59711-0507  
(406) 272-2390  
benjamin@sudduthlaw.com

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 141049-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** KEN LECLAIR  
2421 HIGHLAND BLVD  
BOZEMAN, MT 59715 5852

**Priority Date:** DECEMBER 31, 1912

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** NO FLOW RATE HAS BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM.

**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

**Source Name:** SPRING

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNW	28	3S	5E	GALLATIN

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NESWNW	28	3S	5E	GALLATIN

**Remarks:**

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

141049-00      141055-00      141056-00

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 141055-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** KEN LECLAIR  
2421 HIGHLAND BLVD  
BOZEMAN, MT 59715 5852

**Priority Date:** DECEMBER 31, 1912

**Type of Historical Right:** USE

**Purpose (use):** FISH AND WILDLIFE

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS  
ONSTREAM RESERVOIR.

**Volume:** 1.00 AC-FT  
THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

**Source Name:** SPRING

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNW	28	3S	5E	GALLATIN

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** INSTREAM

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWNW	28	3S	5E	GALLATIN

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**Remarks:**

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

141049-00      141055-00      141056-00

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**GALLATIN RIVER**  
**BASIN 41H**

**Water Right Number:** 41H 141056-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** KEN LECLAIR  
2421 HIGHLAND BLVD  
BOZEMAN, MT 59715 5852

**Priority Date:** DECEMBER 31, 1912

**Type of Historical Right:** USE

**Purpose (use):** RECREATION

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS  
ONSTREAM RESERVOIR.

**Volume:** 1.00 AC-FT  
THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

**Source Name:** SPRING

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNW	28	3S	5E	GALLATIN

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** INSTREAM

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWNW	28	3S	5E	GALLATIN

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**Remarks:**

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

141049-00      141055-00      141056-00

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
GALLATIN RIVER  
BASIN 41H**

**Water Right Number:** 41H 148637-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** KEN LECLAIR  
2421 HIGHLAND BLVD  
BOZEMAN, MT 59715 5852

**Priority Date:** DECEMBER 31, 1912

**Type of Historical Right:** USE

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS  
ONSTREAM RESERVOIR.

**Volume:** 28.00 AC-FT

**Climatic Area:** 4 - MODERATELY LOW

**Maximum Acres:** 7.00

**Source Name:** SPRING, GROUNDWATER

**Source Type:** GROUNDWATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SESWNW	28	3S	5E	GALLATIN

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** HEADGATE

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	7.00		SWNW	28	3S	5E	GALLATIN
<b>Total:</b>	7.00						